NO. 71.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

FEDERAL POWER COMMISSION, *Petitioner*,

v.

THE EAST OHIO GAS COMPANY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit.

MEMORANDUM IN SUPPORT OF PETITIONS FOR REHEARING SUBMITTED ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AND CERTAIN STATE REGULATORY COMMISSIONS, AMICI CURIAE.

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To the Honorable Supreme Court of the United States:

Come now the National Association of Railroad and Utilities Commissioner and the below-listed State regulatory commissions, *amici curiae*, and present this memorandum in support of the petitions for rehearing presented by the Respondents in the above-entitled cause, and, in support thereof, respectfully show:

1. The following state regulatory agencies are greatly concerned over the sweeping effect of the majority decision in this cause, which expands Federal Power Commission jurisdiction to the extent of curtailing and rendering ineffective current state commission regulation, and have authorized the National Association to specifically register

their support in this request for rehearing and reconsideration of this case:

Arizona Corporation Commission
Arkansas Public Service Commission
California Public Utilities Commission
Delaware Public Service Commission
District of Columbia Public Utilities Commission
Georgia Public Service Commission
Idaho Public Utilities Commission
Illinois Commerce Commission
Indiana Public Service Commission
Iowa State Commerce Commission
Kansas State Corporation Commission
Kentucky Public Service Commission
Louisiana Public Service Commission
Maine Public Utilities Commission
Maryland Public Service Commission
Massachusetts Department of Public Utilities
Michigan Public Service Commission
Missouri Public Service Commission
Montana Board of Railroad Commissioners
Nebraska State Railway Commission
Nevada Public Service Commission
New Hampshire Public Service Commission
New Jersey Board of Public Utility Commissioners
New Mexico Public Service Commission
North Carolina Utilities Commission
North Dakota Public Service Commission
Oklahoma Corporation Commission
Oregon Public Utilities Commissioner
Pennsylvania Public Utility Commission
South Dakota Public Utilities Commission
Tennessee Railroad and Public Utilities Commission
Vermont Public Service Commission
Virginia State Corporation Commission
Washington Public Service Commission
West Virginia Public Service Commission
Wisconsin Public Service Commission
Wyoming Public Service Commission

The New York Public Service Commission joins in the application for rehearing and reconsideration of this case,

though not authorizing the joinder of their name on this memorandum in support thereof.

2. The majority opinion states:

> "... the national commerce power alone covered the high pressure trunk lines to the point where pressure was reduced and the gas entered local mains, while the state alone could regulate the gas after it entered those mains."

That the commerce power may have such far-reaching effect is not relevant here. The legislative history of the Natural Gas Act clearly shows that Congress did not intend to give *plenary* powers to the Federal Power Commission (NARUC brief, pp. 14-25). This court, in cases cited on pages 21 to 25 of our brief, *amici curiae*, has consistently held that the Act was designed to supplement not supplant state regulation. The existence of state jurisdiction over the regulation of local natural gas distributing companies has uniformly been determined in the past on the basis of the *Cooley* doctrine (*Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23). To abandon the *Cooley* doctrine in favor of a theory based on the mechanics of the gas industry leads not only to horrendous but vague and nebulous results, as is ably pointed out in the petition for rehearing by the State of Ohio and the Public Utilities Commission of Ohio.

It is apparent from the legislative history of the Act that no such "pressure" theory was intended as determinative of the line of demarcation between the exercise of state and federal authority. Section 1(b) of H. R. 11662 contained a proviso exempting local distribution from federal jurisdiction only if such distribution was from low-pressure mains. (NARUC brief, p. 16). Mr. Benton, then General Solicitor of this Association, suggested an amendment to correct this, so that it would be perfectly clear that any distribution to an ultimate consumer, whether from high or low-pressure mains, would be exempt from federal regula-

tion, and thus subject to state regulation. (Printed Hearings, H. R. 11662—74th Congress, p. 91).

The exact wording of Mr. Benton's proposal was not accepted but the Committee made revisions in Section 1(b) designed to accomplish this same purpose. In subsequent bills, H. R. 12680—74th Congress, H. R. 4008—75th Congress, and H. R. 6586—75th Congress, all reference to gas mechanics, i.e., low-pressure mains, was eliminated from the provisions of Section 1(b) of the Act. Congress did not intend the business of local distribution of natural gas to ultimate consumers to come within the provisions of the Act. In its report, favorably recommending H. R. 6586, (Report No. 709, 75th Congress, 1st Session) the House Committee said:

> "The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State Regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23). There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924) 265 U. S. 298, and *Public Service Commission* v. *Attleboro Steam & Electric Co.* (1927) 273 U. S. 83). The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

Congress thus wrote into the Natural Gas Act a limitation on Federal Power Commission jurisdiction based on the *Cooley* doctrine as evidenced in the *Pennsylvania Gas*

Co. case and not based on a "pressure" theory peculiar to the mechanics of the industry.

3. The majority opinion states further:

> "And in the light of the *Illinois Gas* decision we cannot see how the 'local distribution' proviso can be construed as encompassing all of East Ohio's operations throughout the state. That proviso cannot mean one thing for 'transportation' and another where 'sale for resale' is involved."

It is respectfully pointed out that the *Illinois Gas* decision cannot be applied by analogy to the present case. Illinois Gas Co. was engaged in wholesale sales of natural gas. East Ohio makes no sales for resale, being engaged solely in the local distribution of natural gas. Congress clearly distinguished between these two types of operations and in the above-quoted passage of the House Committee report on H. R. 6585 indicated this in stating ". . . in the case of sales for resale . . . the legal situation is different." Congress intended the continued application of the *Pennsylvania Gas Co.* doctrine in cases involving local distribution, and the application of the *Kansas Gas Co.* doctrine and *Attleboro* doctrine in cases involving wholesale sales, or sales for resale.

That this delineation as related to Federal Power Commission jurisdiction is of practical importance is evident in the instant case. Regulation, accounting-wise, is a necessary adjunct to the establishment of reasonable and just wholesale rates, or rates for sales for resale. East Ohio, however, makes no sales for resale, and even under the majority opinion, the rates for ultimate public consumption, the distribution rates, are exclusively within the jurisdiction of the Ohio Commission. Regulation, accounting-wise, by the Federal Power Commission in the case of East Ohio serves no useful or necessary purpose. The record makes no showing of such. The case involves no rates subject to F.P.C. determination. To uphold the F.P.C. accounting

order can result in only further conflict, accounting-wise between the state and federal commission, and in possible further litigation. The unnecessary extension of the federal power, primarily, however, will result in increased expense to the company which will be reflected in the rates charged the ultimate consumer.

4. The majority opinion states:

> ". . . the logical consequence of such a principle would be that even a pipe line stretching from Texas to Cleveland would be completely exempt from the federal Commission's jurisdiction if it were owned by East Ohio."

We wish to assure the Court that this Association and the State regulatory agencies represented in its membership subordinate themselves to no one in their earnest endeavor and determination to assure that no hiatus or gap should result in the overall natural gas regulatory picture. It was this Association and these State regulatory agencies that actively sought and supported before Congress the precise legislation involved here, the Natural Gas Act, in order to eliminate gaps and make natural gas regulation effective, nation-wise. That the above hypothesis is legally unsound is ably pointed out in Mr. Justice Jackson's dissent in the present case.

Conclusion.

It is respectfully urged that the petitions for rehearing be granted and that the decree of the United States Court of Appeals for the District of Columbia Circuit be, upon further consideration, affirmed.

Respectfully submitted,

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AUSTIN L. ROBERTS, JR.,
Attorneys for Said Association and Said State Commissions.

Certificate of Counsel.

We, attorneys for the National Association of Railroad and Utilities Commissioners and the above-listed State regulatory commissions, *amici curiae*, do hereby certify that the foregoing memorandum in support of the petitions for rehearing in this cause is presented in good faith, and not for delay.

WALTER R. MCDONALD,
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